United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 76-8369
76-6122

To be argued by
F. PETER O'HARA

United States Court of Appeals
For the Second Circuit

B

COUNTY OF SUFFOLK, *et al.*,
Plaintiffs-Appellees,

against

DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants-Appellants.

P/S

THE STATE OF NEW YORK and the NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs-Appellees,

against

THOMAS S. KLEPPE, Secretary of the Interior, *et al.*,
Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT NEW YORK GAS GROUP

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BRIEF OF DEFENDANT-APPELLANT NEW YORK GAS GROUP

Issue Presented

Was it proper for the District Court to grant a preliminary injunction against Lease Sale No. 40?

Statement of the Case

This action was commenced in February, 1975 by the Counties of Nassau and Suffolk along with several towns in those counties seeking a declaratory judgment that the adoption of the National Lease Sale Program for outer continental shelf tracts by Rogers C. B. Morton, then Secretary of the Interior, violated certain Federal statutes relating to environmental protection. Plaintiffs seek to have the National Program set aside and the present Secretary enjoined from taking any further action thereunder.

Plaintiffs State of New York and Natural Resources Defense Council, Inc. (hereinafter referred to as "NRDC") commenced a similar action in June, 1976. The Nassau/Suffolk and the New York State actions were consolidated for discovery and trial purposes.

On July 15, 1976 plaintiffs New York State and NRDC moved for a preliminary injunction against the Secretary of the Interior seeking to prevent any further progress under the National Lease Sale Program, including the holding of Lease Sale No. 40 for the Mid-Atlantic Outer Continental Shelf (OCS), scheduled for August 17, 1976.

On July 20, 1976 the District Court granted the New York Gas Group (hereinafter referred to as "NYGAS") and National Ocean Industries Association (hereinafter referred to as "NOIA") leave to intervene as defendants in these actions.

On July 23, 1976, evidentiary hearings commenced in the District Court and lasted eleven days. Plaintiffs' wit-

nesses testified for eight days and defendants' for three days. Thereafter, on August 13, 1976, Hon. Jack B. Weinstein issued a preliminary injunction against Lease Sale No. 40 but denied a preliminary injunction against future OCS leasing.

Facts

Plaintiffs seek to enjoin Lease Sale No. 40 on the grounds that the final EIS prepared for this sale by the Bureau of Land Management was inadequate. Their witnesses testified variously that the EIS was inadequate in its consideration of possible danger to fisheries (935),* of various biological communities (1155), and in its consideration of the onshore impact of offshore activities (529). Others criticized the EIS as not asking the proper questions or pursuing its inquiries further (1059, 1089) and for not drawing proper value judgments (1260).

Defendants presented several expert witnesses to rebut the contentions of the plaintiffs. Dr. Carl Oppenheimer, a marine scientist specializing in petroleum ecology, testified that the EIS for Lease Sale No. 40 was more complete than those for prior lease sales, especially with regard to fish and biological communities (1959 *et seq.*). He further testified that the EIS emphasized the negative aspects (1969), thus presenting a "worse case" viewpoint. He concluded that the EIS presented the necessary facts and figures to permit the Secretary of the Interior to arrive at a reasonable decision (1963).

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* Numbers in parentheses refer to pages of the transcript of the evidentiary hearings.

Dr. David Hoult, an expert from MIT on oil spill trajectories, testified that the EIS was adequate to provide a decision-maker with a "reasonably accurate estimate in the trajectory analysis of where oil might go if it were spilled" (2170, 2180).

Dr. Alfred Smalley, a biologist from Tulane University, testified that the EIS for Sale 40 presented a "gloomy picture of the results of offshore exploration and production in Mid-Atlantic states" and that it was the most comprehensive EIS relating to OCS activities that he had read (2218).

Mr. Eugene Luntey, President of The Brooklyn Union Gas Company, testified to the acute shortage of natural gas, particularly in New York and the Northeast (2279). He discussed the adverse effect of the shortage on consumers of gas (2289 *et seq.*) and on the general public (2286 *et seq.*).

Dr. William Wenstrom, an environmental consultant, testified that the EIS "more than adequately treats the possible onshore impacts of this [OCS] operation" (2372, 2373, 2375).

In addition, defendants' witnesses included employees of the Federal Government, who testified to the leasing program and federal regulatory and safety procedures for OCS activity (2546 *et seq.*).

The testimony of the various expert witnesses was supplemented by extensive documentary material and numerous affidavits which were submitted as evidence in support of the various positions.

At the conclusion of the hearings, Judge Weinstein *sua sponte* raised the issue of whether the EIS had adequately considered the possibility that the states, on their own and exclusive of Federal/State programs for wetland preservation, would restrict the use of pipelines in bringing to shore any oil or gas which may be discovered in the OCS area (2722 *et seq.*).

The Court below, in a 78-page opinion, rejected every criticism of the EIS raised by plaintiffs. Nevertheless, it granted the preliminary injunction on the limited ground which it raised on its own: that the EIS did not adequately consider the possibility of future state actions which might force use of tankers instead of pipelines.

Argument

This Circuit has enunciated its standard frequently for granting or denying preliminary injunctions. Recently that standard was reiterated in *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F. 2d 1356 (2d Cir. 1976) where this Court reversed the grant of a preliminary injunction. It said:

> "The opinion of the District Court granting the relief requested was based on the familiar test of this circuit that a preliminary injunction will issue 'only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting

> the preliminary relief.' " (original emphasis) 535 F. 2d (*supra*) at 1358.

See also *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F. 2d 247 (2d Cir. 1973); *Brown & Williamson Tobacco Corp.* v. *Engman,* 527 F. 2d 1115 (2d Cir. 1975); *414 Theater Corp.* v. *Murphy,* 499 F. 2d 1155 (2d Cir. 1974); *Exxon Corporation* v. *City of New York,* 480 F. 2d 460 (2d Cir. 1973).

The Court in *Triebwasser* then went on to state:

> ". . . At the outset, we should note that this language of the second prong of the *Sonesta* test does not eliminate the basic obligation of the plaintiff to make a clear showing of the threat of irreparable harm. That is a fundamental and traditional requirement of all preliminary injunctive relief, ..." 535 F. 2d (*supra*) at 1359.

It is clear that the Court below erred by not applying the proper standards for testing the adequacy of the environmental impact statement and incorrectly concluded that the plaintiffs would suffer irreparable harm as a result of Lease Sale No. 40.

POINT I

The Court below erred in granting the preliminary injunction.

As stated by Mr. Justice Marshall in his opinion of August 19, 1976, denying plaintiffs' application to lift the stay of Judge Weinstein's preliminary injunction issued by this Court:

> "... the sole question at issue is whether the District Court properly applied the controlling standards in concluding the EIS lacked information concerning state regulation of shore lands which was 'reasonably necessary' for evaluating the project."
>
> *State of New York* v. *Kleppe*, Docket No. A-150, —— U.S. —— (August 19, 1976).

In his opinion, Mr. Justice Marshall clearly delineated the parameters of the dispute in this action. One essential item for satisfying the requirements of NEPA is that before an agency takes a major action, it must have taken "a hard look at environmental consequences." *Kleppe* v. *Sierra Club*, —— U.S. ——, 44 U.S.L.W. 5104 at n. 21 (U.S. Dec. June 28, 1976). That this has been done is supported by the record and by Judge Weinstein's opinion.

A "rule of reason" has evolved in the decisions of courts which have considered the adequacy of environmental impact statements. *Natural Resources Defense Council* v. *Callaway*, 524 F. 2d 79 (2d Cir. 1975). In that case, this Court said:

> "We agree with the Navy that NEPA does not require it to make a 'crystal ball' inquiry, *Natural Resources*

> *Defense Council Inc.* v. *Morton,* 148 U.S. App. D.C. 5, 548 F. 2d 827, 837 (1972), and that an EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible . . . A government agency cannot be expected to wait until a perfect solution of environmental consequences of proposed action is devised before preparing and circulating an EIS." 524 F.2d (*supra*) at 88.

Other Circuit Courts have held similarly that NEPA does not require encyclopedic recitation of every conceivable causal factor involved in reaching an environmental conclusion. *Sierra Club* v. *Morton* (*MAFLA*), 510 F. 2d 813 (5th Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Morton,* 458 F. 2d 827 (D.C. Cir. 1972); *Trout Unlimited* v. *Morton,* 509 F. 2d 1276 (9th Cir. 1974); *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe,* 487 F. 2d 849 (8th Cir. 1973).

Examination of the record shows clearly that the Court below erred in granting a preliminary injunction on the ground that the EIS was inadequate. In his Opinion dated August 13, 1976, Judge Weinstein found the Environmental Impact Statement, prepared by the Bureau of Land Management for Sale No. 40, to be adequate on all grounds save one. The Opinion stated:

> "The final EIS Sale No. 40 together with the PDOD prepared by Staff to summarize and clarify the issue for decision satisfactorily meets both the spirit and

> the letter of the NEPA requirements in all respects except one." Opinion, p. 31

The narrow and only basis for his decision to enjoin Sale No. 40 was that the EIS failed to consider adequately "local decisions that might have a substantial environmental impact." Opinion, p. 32. The Court below stated:

> "There is one major area, however, where the Secretary's decision was based on insufficient analysis of environmental dangers. The impact of possible state decisions affecting such matters as whether pipelines or tankers will need to be used and where on-shore facilities can be located is inadequately covered." Opinion, p. 19

This possibility was not "virtually ignored" by the EIS as the Court below suggested. Indeed, the EIS is replete with references to consideration of state retention of control and to the possible need to use tankers instead of pipelines. The EIS extensively addressed the speculative possibility of future action by states and the environmental result which the Court below found "inadequately" considered. A reading of the EIS suggests that the conclusion of the lower court was in error. The Statement contains numerous discussions directly on point. These are clearly written and sufficiently placed throughout the Statement to meet any test of thoroughness yet devised by the Courts in applying the "rule of reason" to Environmental Impact Statements. A sampling of the discussions on the point at issue is quoted here and shows clearly that the Department of Interior gave ample consideration to possible State action and its impact on the proposed action:

Vol. I, p. 15

"While proposed stipulations seek to prevent transportation of oil by tankers to the extent possible, use of tankers for transportation cannot be absolutely ruled out at this time."

Vol. I, p. 50

"In addition to the States' coastal zone management programs, existing State laws regulating or controlling development, facility siting and emission levels, have application to the coastal zone. As such, any OCS-related facility development in the coastal zone would be subject to these regulations."

See also Vol. I, p. 61

Vol. I, p. 617

"Efforts are currently underway, on a national level, as well as state and local levels in the Mid-Atlantic region, to achieve a balanced use of land resources. Wetlands legislation, proposed energy facility siting laws, coastal zone management efforts and regional and local planning efforts are all examples of attempts to accommodate necessary activities with the least environmental damage and the greatest enhancement of the human environment. The extent to which these competing land uses will be balanced will continue to depend on the effectiveness of regulatory and planning efforts at all levels of government."

Vol. II, pp. 20-21

"If it should not be technically and/or economically feasible to bring production ashore by pipelines, tankers may have to be used.[1]

1. Factors which could hinder or prohibit the use of pipelines in this Mid-Atlantic area include . . . 3) receptivity of State and local jurisdictions along Mid-Atlantic coast to the approval of pipeline landfalls that would be needed."

Vol. II, p. 181

"If OCS-produced oil from the proposed sale has to be transported by tankers to shore, as opposed to transported via pipeline, it would still be expected to replace shipments of foreign crude oil. . . . However, shipment by vessel would probably result in an overall incremental increase in traffic . . . ."

See also Vol. II, p. 183

Vol. II, p. 454

"If a proposed gas processing plant involved the use of wetlands, the permitting processes under the wetlands acts would be invoked. In such instances, environmental impact analyses would be required as prerequisite to the issuance of a wetlands use permit. Specific legislation in New Jersey[1] would require a permit, and an environmental impact statement prerequisite to its issuance, for the location of a gas processing plant in the legislatively defined coastal zone. Legislation in Delaware[2] would ban such a facility in a legislatively defined coastal zone. Generally, even after permitting and environmental impact statement processes have been satisfied, the proposed facilities must be in conformance with appropriate local zoning plans.

1. Coastal Zone Facilities Review Act (1973).
2. Coastal Zone Act (1971)."

Volume III of the EIS then incorporates extensive comments received on the draft environmental impact statement from various Federal, State and Local agencies together with comments from other interested groups. The subject issue was included in the comments of several governmental agencies including the United States Coast Guard (p. 96), the Environmental Protection Agency (p. 141), the Geological Survey Bureau (p. 161), the State of

New York* (pp. 193, 224, 228) and the Department of Environmental Protection of the State of New Jersey (pp. 242, 258). Thus, the drafters of the final EIS had before them for consideration the very issue which the District Court has suggested was not available for consideration by the Secretary at the time he made his decision to hold Lease Sale No. 40.

The issue of possible preclusion or prohibition by the various states and localities was commented upon by the various states and localities and was recognized by the Department of Interior staff as one of the ". . . specific issues of major concern . . ." (Vol III, p. 14) which was responded to and considered in the final Statement. Not only was it discussed through Vols. I and II, it was treated as a major issue in the responses to comments in the early pages of Vol. III and included in the full text of printed comments which Interior had received from others. Vol. III, pp. 77 *et seq.*

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* During oral argument before this Court, counsel for New York State objected to the characterization of Judge Weinstein's sole basis for the preliminary injunction as *sua sponte* (a characterization concurred in by Mr. Justice Marshall in affirming the stay granted by this Court). The comments of the State of New York and others upon the draft Environmental Impact Statement did raise this issue as noted above. However, those comments were considered by the Department of Interior, incorporated in the final EIS, responded to in the final EIS, and discussed at length in the final EIS. The *sua sponte* characterization comes from the fact that it was not raised by plaintiffs either in the motion for a preliminary injunction or in the extensive trial of the motion before Judge Weinstein. Indeed, the issue surfaced as a matter of concern to the Judge at the close of the evidentiary portion of the case and shortly prior to his order granting the preliminary injunction. Had the plaintiffs considered this issue to have been unresolved in the final EIS, they had ample opportunity in their pleadings and throughout an extensive trial to present such argument. They did not do so.

The introduction to Vol. III of the Final EIS outlines the extensive contacts, consultations and communications between Department of Interior officials with representatives of other Federal agencies, with State agencies and with regional and local agencies. Vol. III (pp. 1-14.) It then lists issues raised by various groups and sets forth responses to those issues. Several of the responses dealt with the very matter on which the Court below concluded there was no meaningful discussion. See, for example:

Vol. III, p. 18

> ". . . The statement does recognize that if tankers have to be used, crude oil may mean a slight increase in the amount of vessel traffic."

Vol. III, p. 32

> "Indeed, since State and local jurisdictions would have to permit both onshore sections of pipelines and pipelines in State waters, pipeline landfalls in areas where they would cause great environmental impact are not likely."

Vol. III, p. 46

> "The Department is also committed to the concept of requiring transport of oil via pipeline rather than allowing tanker transport . . . However, in order to be realistic, these stipulations are phrased to take into account that there may be situations where pipeline burial or use of pipelines are not feasible."

See also Vol. III, p. 96

In determining that this consideration was inadequate, the Court below violated the "rule of reason." To follow its opinion to a logical conclusion would require an investigation to final conclusion of every single cause or factor

which might possibly result in an environmental impact. This is neither the purpose nor the intent of NEPA as determined by the Circuit Courts which have confronted the question. Because of the District Court's failure to apply the rule of reason to this EIS, the order granting a preliminary injunction should be reversed.

POINT II

The Court below incorrectly determined that the plaintiffs would suffer irreparable harm as a result of Lease Sale No. 40.

In granting the preliminary injunction the Court below stated that:

> "... without the injunction, major federal action significantly affecting the environment will continue without prior compliance with the careful and informed decision-making process required by NEPA." Opinion, p. 73

In determining that plaintiffs would suffer irreparable harm, the District Court concluded that lessees would be able to proceed with production as soon as feasible and that "oil spills and destruction of biota are possible once production begins." Opinion, p. 74. In so finding, the Court ignored testimony by witnesses for both plaintiffs and defendants that there will be a three-year time lag between leasing and production. While the District Court noted this fact in its opinion, it seemingly disregarded it in reaching its decision. Opinion, p. 76. This Court agreed that no irreparable injury was threatened since no im-

mediate anti-environmental actions were contemplated. *Kleppe* v. *State of New York*, Docket No. 76-8369 (2d Cir., August 16, 1976).

Plaintiffs presented no evidence that any irreparable harm would result with the holding of Lease Sale No. 40. Indeed, the District Court in the concluding paragraphs of its opinion discussing Sale 40 was concerned with consideration by the Secretary and not irreparable harm:

> "Finally, considerations of state law and policy as it affects the Sale 40 program can be accomplished speedily. If the Secretary decides, after considering this factor in the light of all other NEPA materials, to proceed with Sale 40, he may do so." Opinion, p. 77

In *Stamicarbon, N.V.* v. *American Cyanamid Company*, 506 F. 2d 532 (2d Cir. 1974), this Court upheld a denial of a preliminary injunction when the alleged injury, which would otherwise be irreparable, was only speculative. Here the national interest in seeking energy self-sufficiency and the interest of the consumers of New York in obtaining much needed natural gas supplies should not be blocked on the basis of charges of irreparable injury which in the last analysis amount to nothing more than speculation about the future. The balancing of the equities herein tips clearly in favor of defendants since the plaintiffs have failed to prove the existence of any irreparable injury. Under these circumstances the Court below erroneously granted the preliminary injunction.

Conclusion

The order of the District Court granting a preliminary injunction should be reversed.

Dated: Brooklyn, New York
September 10, 1976

Respectfully submitted,

CULLEN AND DYKMAN
Attorneys for Defendant-Appellant
New York Gas Group

F. PETER O'HARA
HUGH M. TURK
Of Counsel

Affidavit of Service by Mail #5448

In re:

Department of the Interior, et al. v County of Suffolk, et al.

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on SEP 10 1976, 197..., he served 2 copies of the within Brief in the above named matter on the following counsel by enclosing said two copies in a securely sealed postpaid wrapper addressed as follows:

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and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 10th day of Sept. 1976

Jack A Messina

JACK A. MESSINA
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Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1977

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within Brief is hereby
admitted this 10th day of
Sept. 1976

Signed _____

Attorney for Natural Resources
Defense Council, Inc.

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within Brief is hereby
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Sept. 1976

Signed _____

Attorney for _____

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RECEIVED
DEPARTMENT OF LAW
SEP 10 1976
NEW YORK CITY OFFICE
ATTORNEY GENERAL

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